FILED

96 45 JUL 8 1996

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

MICHAEL COFFEY,

Petitioner,

vs.

ERNEST WINSKE and DAVID WINSKE,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN J. WASHBURN
Counsel of Record
Attorney for Petitioner
Four Dodge Road
P.O. Box 264
North Reading, Massachusetts 01864
(508) 664-5000

9114
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

83 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals was in error, in conflict with prior decisions of this Court and acted against public policy by affirming a District Court's determination that an arbitration body can determine its own jurisdiction despite the existence of a Final Order and Judgment from a United States District Court, where said Final Order and Judgment had the effect of dismissing the then asserted claim against the Petitioner.

2. Whether the Court of Appeals was in error and in conflict with the reasoning of *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. __, 115 S. Ct. 1920, 131 L. Ed. 2d 985(1995) by summarily affirming a District Court's confirmation of an arbitration award without addressing an issue of law (*i.e.*, jurisdiction) *de novo*.

3. Whether the First Circuit Court of Appeals was in error and in conflict with other courts of appeals by ruling that whether a claim was time barred under an arbitration body's own rules was solely within the discretion of the arbitrators and not a jurisdictional issue subject to independent judicial review.

LIST OF PARTIES

All parties to the proceeding in the United States Court of Appeals for the First Circuit appear in the caption.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	10
I. The Court of Appeals has decided a federal question of jurisdiction in conflict with decisions of this Court, has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure from the District Court as to call for an exercise of this Court's supervisory power.	10
A. Enforcement of the arbitration awards was contrary to public policy.	10
II. The Court of Appeals is in conflict with this Court's decision in *First Options of Chicago, Inc.*	

Contents

Page

v. Kaplan on the matter of the standard of appellate review in reviewing the confirmation of arbitration awards. 14

A. Despite the existence of issues of law, the Court of Appeals applied an "abuse of discretion" standard in reviewing the District Court's confirmation of the arbitration awards. 14

III. The Court of Appeals' interpretation of the jurisdiction and discretion of arbitrators to "arbitrate their own arbitrability" conflicts with other Courts of Appeals on this same important matter. 17

A. The First Circuit Court of Appeals has held that a determination as to whether claims sought to be arbitrated are timely under the arbitration body's own code are within the arbitrator's discretion thus joining a conflict among the circuit courts. 17

Conclusion 23

TABLE OF CITATIONS

Cases Cited:

AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643 (1986) 12, 18

Contents

Page

Dean Witter Reynolds, Inc. v. McCoy, 995 F.2d 649 (6th Cir. 1983) 20

Edward D. Jones & Co. v. Sorrells, 957 F.2d 509 (7th Cir. 1992) 17, 18, 19, 20

First Options of Chicago, Inc. v. Kaplan, 19 F.3d 1503 (3rd Cir. 1994), *rehearing denied*, 29 F.3d 111 (3d Cir. 1994), *cert. granted*, 115 S. Ct. 634 (1994), *aff'd*, 115 S. Ct. 1920 (1995) ..... i, 12, 14, 15, 16, 17, 21

FSC Securities Corp., Inc. v. Freel, 14 F.3d 1310 (8th Cir. 1994) 21

Hurd v. Hodge, 334 U.S. 24 (1948) 10

Karasyk v. Marc Commodities Corp., 770 F. Supp. 824 (S.D.N.Y. 1991) 13, 20

Merrill Lynch Pierce Fenner & Smith, Inc. v. Cohen, 62 F.3d 381 (11th Cir. 1995) 20, 21, 22

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 11, 13

O'Neel v. National Association of Securities Dealers, Inc., 667 F.2d 804 (9th Cir. 1982) 21, 22

Paine Webber v. Landay, 903 F. Supp. 193 (D. Mass. 1995) 23

Contents

Page

Paine Webber, Inc. v. Allen, 888 F. Supp. 53 (E.D. Va. 1993), *aff'd*, 45 F.3d 427 (4th Cir. 1995) 20, 22

Paine Webber Incorporated v. Farnam, 870 F.2d 1286 (7th Cir. 1989) 18

Paine Webber, Incorporated v. Hartmann, 921 F.2d 507 (3rd Cir. 1990) 17, 22

Robbins v. Chipman Trucking, Inc., 866 F.2d 899 (7th Cir. 1988) 17, 18, 22, 23

Roney and Co. v. Kassab, 981 F.2d 894 (6th Cir. 1992) . 22

Shearson Lehman Hutton, Inc. v. Waggoner, 944 F.2d 114 (2d Cir. 1991) 21, 23

Smith Barney Shearson, Inc. v. Boone, 47 F.3d 750 (5th Cir. 1995) 21

Southland Corp. v. Keating, 465 U.S. 1 (1983) 13

Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960) 12

Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 593 (1960) 12

Steelworkers v. Warrior Gulf Navigation Co., 363 U.S. 574 (1960) 12

Contents

	Page
United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987)	10, 13
Valentin v. U.S. Postal Service, 787 F.2d 748 (1st Cir. 1986)	11
W.R. Grace and Co. v. Local Union 759, International Union of United Rubber Workers, 461 U.S. 757 (1983)	10
Statutes Cited:	
7 U.S.C. § 21	4
9 U.S.C. § 9	2, 8
9 U.S.C. § 10	1, 2, 7
18 U.S.C. § 1961, *et seq.*	3
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1291	9
28 U.S.C. § 1331	7
Rules Cited:	
Fed. R. Civ. P. 23	3
1st Circuit Local Rule 27.1	9, 15

Contents

Page

Other Authorities Cited:

National Association of Securities Dealers Code, § 15 ..... 18, 20, 22, 23

National Futures Association Codes of Arbitration:

§ 2(a) 8, 20, 21

§ 2(a)(1) 19

§ 5 ..... 6, 19, 20

§ 15 20

Res Judicata Effect of Judgment in Class Action Upon Subsequent Action in Federal Court, 48 A.L.R. Fed. 675 11

APPENDIX

Appendix A — Mandate of the United States Court of Appeals for the First Circuit Dated April 30, 1996 .. 1a

Appendix B — Per Curiam Affirmance of the United States Court of Appeals for the First Circuit Dated April 8, 1996 ..... 2a

Appendix C — Judgment of the United States District Court for the District of Massachusetts Dated September 18, 1995 ..... 5a

Contents

Page

Appendix D — Judgment of the United States District Court for the District of Massachusetts Dated September 18, 1995 ..... 6a

Appendix E — Memorandum and Order of the United States District Court for the District of Massachusetts Dated September 15, 1995 ..... 7a

Appendix F — Final Judgment and Order of the United States District Court for the District of Massachusetts Dated July 15, 1988 ..... 18a

Appendix G — Statutes and Rules Involved 24a

Appendix H — Arbitration Award in *Ernest Winske v. Michael Coffey and William Blumenreich*, NFA No. 93-ARB-99 ..... 30a

Appendix I — Arbitration Award in *David Winske v. Michael Coffey and William Blumenreich*, NFA No. 93-ARB-84 ..... 32a

Appendix J — Decision of Arbitrators in *Kenneth Poulin v. Kevin Barry, Michael Coffey and Scott Stanwood*, NFA No. 92-ARB-189 ..... 34a

Appendix K — Affidavit of Cynthia A. Cain 35a

Appendix L — Certification of Gregory Prusik (Exhibit 3 in Cain Affidavit) 37a

Contents

	Page
Appendix M — Affidavit of Lori Solberg	40a
Appendix N — NFA Code Section 1(a)	43a
Appendix O — NFA Code Section 2(a)	44a
Appendix P — NFA Code Section 5	46a
Appendix Q — NFA Code Section 6	47a

To the Chief Justice and Associate Justices of the United States Supreme Court:

Michael Coffey, the petitioner above named, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals, for the First Circuit, affirming judgments and the confirmation of arbitration awards to the above named respondents in the United States District Court for the District of Massachusetts.

OPINIONS BELOW

The opinions of the Court of Appeals and the District Court are not officially reported and appear in the Appendix hereto at 2a-4a and 7a-17a respectively.

STATEMENT OF JURISDICTION

The order of the Court of Appeals for the First Circuit, affirming the judgments of the United States District of Massachusetts, was entered on April 8, 1996 (App., *infra*, 2a-4a). No party sought a rehearing and the mandate was issued on April 30, 1996 (App., *infra*, 1a). This petition was filed within 90 days of the entry of the order. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Title 9 U.S.C. § 10 of the United States Code provides that the United States court in and for the district wherein an arbitration award was made may make an order vacating the award upon the application of any party to the arbitration "where the arbitrators were guilty of misconduct . . . or of any other misbehavior by which the rights of any party have been prejudiced" or "[w]here the arbitrators exceeded their powers".

This case also involves 9 U.S.C. § 9 which, along with 9 U.S.C. § 10, is set out in its entirety in the Appendix at 24a-25a.

STATEMENT OF THE CASE

On December 12, 1986, Respondents Ernest and David Winske (the "Winskes") initiated a civil action against First Commodity Corporation ("FCCB"), Noreen Hunter and William Blumenreich in the United States District Court of Massachusetts (App., *infra*, 8a). In their Complaint the Winskes asserted several common law and federal and state statutory counts all sounding in direct fraudulent inducement. The factual allegations of the Winskes' Complaint were that, based, upon repeated urging by Hunter (at a meeting on January 23, 1985 and at other times by telephone), David Winske, and then Ernest Winske invested sums of money with FCCB; that contrary to representations made by Hunter, the Winske accounts lost money; that Blumenreich "took over the Winske accounts" and represented to Ernest Winske that he would get his money back; that Hunter and Blumenreich had, at various times, convinced David and/or Ernest Winske to keep their FCCB accounts open; and that, as a result, the Winskes lost money. Petitioner Michael Coffey was not even mentioned in the Initial Winske Complaint.

On February 19, 1987, the Winskes, filed an Amended Complaint in the civil action described above (App., *infra*, 8a). In their Amended Complaint, the Winskes now included Michael Coffey and other managerial personnel as parties. The specific factual allegations concerning the roles of Hunter and Blumenreich with regard to the solicitation, opening and management of the Winske account remained completely unchanged. Although the Amended Complaint mentioned Michael Coffey, there was absolutely no reference whatsoever to Michael Coffey engaging in any direct fraudulent inducement

nor having any contact whatsoever with either of the Winskes. Factually, as it related to Coffey, the Amended *Winske* Complaint contained only generalized allegations about Coffey's role as a manager of FCCB's Boston office and that Coffey, along with the other new defendants, somehow knew of the overall management of FCCB, played an active role in its management and knew of, played an active role or knowingly acquiesced in, the training program of various brokers. With the exception of a Racketeer and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, count, the individual counts set forth at the conclusion of the Amended Complaint were boilerplate and identical with those of the Initial Complaint. The only count in the Amended Complaint which even mentioned the new managerial defendants (including Coffey) by name was the RICO Count. However, even the amended RICO Count still alleged that the "obtaining or money or property" by "means of false or fraudulent means" was accomplished by defendants Hunter and Blumenreich.

On May 29, 1987, an individual named Kenneth Poulin filed a similar civil action in the United States District Court of Massachusetts. Compared to the *Winske* complaints, the *Poulin* complaint alleged that different individuals had engaged in the direct fraudulent inducement of funds from Mr. Poulin but also included the same boilerplate allegations and "RICO" count concerning Michael Coffey and the other managerial defendants. During the course of their litigations, both the Winskes and Mr. Poulin were represented by the same attorney.

As a result of a number of other lawsuits filed against First Commodity and pursuant to Federal Rule of Civil Procedure ("FRCP") 23 (App., *infra*, 26a-29a), a class action was certified and the United States District Court of Massachusetts effectively consolidated all of the First Commodity federal court litigation under *In Re: FCCB Customer Accounts Litigation,* Multi District

Litigation No. 713 (App., *infra*, 8a). On July 15, 1988, the Federal District Court of Massachusetts approved a Final Judgment and Order of Dismissal in *In Re: FCCB Customer Accounts Litigation* (the "Final Judgment") (App., *infra*, 8a, 18a-23a). The Final Judgment dismissed and barred all litigation (including any causes of action, suits and arbitrations) against First Commodity's "present and former directors, officers, employees and agents" (App., *infra*, 19a-21a). The Final Judgment had one exception: members of the "Rule 23(b)(3) class" who had "opted out" of the class settlement were still free to pursue their rights but only for actual damages against First Commodity and "First Commodity's salespeople" (App., *infra*, 20a, 21a). The Winskes and Mr. Poulin "opted-out' of the class settlement and stayed their federal court proceedings pending arbitration (App., *infra*, 9a).

On December 9, 1992, Mr. Poulin filed an Arbitration Claim before the National Futures Association ("NFA"). The NFA is a futures association registered with the Commodity Futures Trading Commission under the Commodity Exchange Act, 7 U.S.C. § 21. On June 1, 1993, Ernest and David Winske filed Arbitration Claims before the NFA. As with their court complaints, the *Poulin* and *Winske* Arbitration Claims, as they related to Michael Coffey, were identical in their allegations: it was not alleged that Michael Coffey was a "salesperson" nor did any of them (the Winskes and Mr. Poulin) ever allege that he ever even met Michael Coffey (let alone allege that Coffey engaged in direct fraudulent inducement).

An Arbitration Panel was appointed in *Poulin* and on July 19, 1993, Michael Coffey filed a Motion to Dismiss the *Poulin* Arbitration, as it related to him. Coffey argued that the *Poulin* Arbitration was barred by the Final Judgment and Order of Dismissal in *In Re: FCCB Customer Accounts Litigation* (the "Final Judgment"). The crux of Coffey's argument was based on the fact that the Final Judgment stated that it dismissed,

discharged and ordered released any and all actions alleged as to FCCB and its present and former directors, officers, employees and agents except to the extent that those persons who had requested exclusion were still "free to pursue, in separate proceedings and at their own cost, whatever rights they may have for actual damages against First Commodity and First Commodity's salespeople." Coffey argued that insofar as he was only alleged to have been a manager (and not a "salesperson") the Final Judgment had the effect of dismissing the *Poulin* claim as to Coffey and that the NFA had no jurisdiction to hear the *Poulin* claim against Coffey. On August 16, 1993, the Poulin Arbitrators granted Coffey's Motion to Dismiss on the basis that they "did not have the jurisdiction to hear the claims against Michael Coffey" (App. *infra*, 34a).

An Arbitration Panel was appointed in *Winske* and on January 5, 1994, Michael Coffey moved to dismiss the *Winske* Arbitration Claims, as they related to him. In his Motion to Dismiss the *Winske* Arbitrations, Coffey reiterated his earlier arguments in *Poulin*, stressed the identical nature of the allegations against Michael Coffey in the *Poulin* and *Winske* cases, called attention to the *Poulin* dismissal, and emphasized that neither of the Winskes had ever alleged that Coffey was a "salesperson". Seven days later, on January 12, 1994, the Winskes each submitted a "Motion to Amend Their Claims" as well as an "Amended Arbitration Claim". The Winskes now sought to allege that Coffey was present for some of their previously alleged January 23, 1985 meeting with Hunter, and, with Hunter, engaged in direct fraudulent inducement to the Winskes. In their Motion to Amend, the Winskes offered no rationale for their suddenly refreshed memory or the inherent contradictions with their previous pleadings. Instead, the Winskes simply stated that the amended claims expanded upon "Coffey's direct dealings with the claimants in his sales capacity". This was the first time in the now eight year history of

the *Winske* litigation that either of the Winskes had alleged that Coffey had a direct "sales capacity" at FCCB and that Coffey had engaged in direct fraudulent inducement (App., *infra*, 11a). Coffey objected to these new claims and referred the arbitrators to § 5 of the NFA Code of Arbitration. Said Section requires the rejection of any claim where notice is not received by the secretary of the NFA within two years from the date the party knew of the act that is the subject of the controversy (App., *infra*, 46a).

The Arbitrators did not rule on the Winske Motion to Amend their claims nor did they ever rule that Coffey was a "salesperson". Rather, in the words of the NFA Arbitration Case Manager:

> NFA staff determined that rather than adding a new cause of action, the submissions provided new information on a claim contained in the original pleadings. As a result, NFA staff contacted the parties by telephone on January 21, 1994 to inform them that that the filing was not considered to be an amendment to the Demands for Arbitration and, therefore, would not be decided by the arbitrators.

Affidavit of Lori Solberg, (App., *infra*, 41a-42a). On that same date, January 21, 1994, four days before the hearing, the parties were also informed by telephone that Coffey's Motion to Dismiss had been denied. No explanation for this denial was ever given.

The arbitration proceedings were conducted over four days during a five month period. The participants were Ernest Winske, David Winske, William Blumenreich and Michael Coffey (Noreen Hunter, the individual alleged to have initially

solicited the Winske funds, had filed bankruptcy and FCCB was no longer in existence. Thus, neither was a party to the arbitration proceedings). On May 2, 1994, the arbitrators issued awards, against Michael Coffey, of $6,120 to Ernest Winske and $4,572 to David Winske while denying the claims against Blumenreich (App., *infra*, 30a-33a). The awards consisted of a list of issues that the arbitrators asserted that they had decided and a reference to amounts awarded as "compensatory damages" plus $100 each for one half of the filing fees. However, there was no written explanation for the determination of liability. Similarly, no factual findings (*i.e.*, whether Coffey was a "salesperson") were ever made by the arbitrators.

Petitioner Michael Coffey then filed Petitions for Orders to Vacate the Arbitrators' Awards with the United States District Court for the District of Massachusetts, pursuant to the court's jurisdiction under 9 U.S.C. § 10 and 28 U.S.C. § 1331. Petitioner Coffey sought relief under the theory that the Arbitrators exceeded their authority and/or committed misbehavior in issuing the Awards. One of Petitioner Coffey's arguments was that the arbitrators had no jurisdiction to enter awards against him insofar as (1) any non-sales claims against Coffey were dismissed and barred under the Final Judgment; and (2) any claims that Coffey engaged in direct fraudulent inducement, not having been made until seven years after the filing of the Winske's initial district court complaint, would be time-barred under the NFA's own Code of Arbitration which prohibits the arbitration of any claim "within two years from the date when the party asserting the claim knew or should have known of the act or transaction that is the subject of the controversy." (App., *infra*, 46a). Therefore, argued Coffey, the arbitrators exceeded their authority by deciding claims over which they had no jurisdiction.

The Winskes responded by filing objections to the Motion to Vacate the Arbitration Award and Cross Motions to Confirm the

Awards under 9 U.S.C. § 9. Coffey's Petitions and the Winske Cross Motions, although initially assigned to a different judge, were reassigned to Judge Wolf, who was previously the Judge to whom the original *Winske* district court cases were assigned and the Judge who presided over *In Re: FCCB Customer Accounts Litigation.* In this later capacity, Judge Wolf had approved and signed the previously referenced Final Judgment in *In Re: FCCB Customer Accounts Litigation.* (App., *infra*, 23a).

On September 15, 1995 Judge Wolf issued a Memorandum and Order in both *Winske* cases (App., *infra*, 7a-17a). In his Memorandum and Order, Judge Wolf did not address the jurisdictional issues raised by Coffey. Judge Wolf determined that his court's role in reviewing the arbitrators' decisions was limited and applied a contractual analysis (App., *infra*, 10a). However, Judge Wolf cited to no specific signed contract or agreement. Rather, the Judge's sole reliance for the existence of an "agreement" was the NFA's assertion, by affidavit, that NFA members agree to abide by its Code of Arbitration which provides for "mandatory arbitration" under Section 2(a) of said Code (App., *infra*, 9a, 35a-36a). The Judge noted that the allegations that Coffey "personally participated in FCCB's efforts to sell [the Winskes] commodities options" were "not part of the original allegations against Coffey" (App., *infra*, 11a). Additionally, the Judge made no negative determination or even an expression of disapproval or skepticism of Coffey's attempted use of the Final Judgment and Order. Instead, the Judge concluded that it was "well within the arbitrators broad discretion to believe the Winskes and find Coffey to be one of the 'salespeople' subject to claims by opt-outs" (App., *infra*, 11a). Similarly, in addressing the contention that the direct fraudulent claims against Coffey were time barred under the NFA's Code of Arbitration, Judge Wolf concluded that the decision that Coffey had notice of the Winske claims "was within the arbitrator's discretion" (App., *infra*, 12a). The Judge then confirmed the

Winske arbitration awards and ordered judgments to issue for the Winskes (App., *infra*, 5a, 6a, 16a, 17a).

Coffey then appealed to the United States Court of Appeals for the First Circuit pursuant to the Court of Appeals jurisdiction under 28 U.S.C. § 1291. Coffey argued that the District Court erred in (1) not vacating the arbitration awards because of the arbitrators' lack of jurisdiction; and in (2) not applying a standard of "independent review" given the existence of jurisdictional issues. On April 8, 1996, the Court of Appeals, pursuant to First Circuit Local Rule 27.1 (App., *infra*, 29a), summarily disposed of Coffey's appeal by affirming the order confirming the arbitration awards (App., *infra* 2a-4a). The Court of Appeals concluded that the NFA Code of Arbitration "clearly states that disputes involving commodity futures 'shall he arbitrated under this Code' " (App., *infra*, 3a). The Court of Appeals also reiterated the earlier conclusions of the District Court that the "arbitrators' finding that Coffey was a 'salesperson' " and their "determination that [the Winske's] claims were not time barred under the NFA Code" were both well within their discretion. The Court of Appeals, like the District Court, made these conclusions despite the fact that arbitrators never specifically found Coffey to be a "salesperson" nor did they decide whether the new claims were time barred (the Winskes' Motion to Amend was never ruled on, the NFA staff having taken it upon themselves to evaluate the new claims) (App., *infra*, 41a, 42a).

Petitioner Coffey now seeks a Writ of Certiorari from this Honorable Court so that this matter may be reviewed. The NFA decided its own jurisdiction despite the existence of a Final Judgment and Order from a federal district court. In addition, the NFA sought to justify this by ignoring their own Code of Arbitration. That, the District Court and the Court of Appeals permitted and acquiesced in this makes the supervision of this Court necessary.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION OF JURISDICTION IN CONFLICT WITH DECISIONS OF THIS COURT, HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND SANCTIONED SUCH A DEPARTURE FROM THE DISTRICT COURT AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

A. Enforcement of the arbitration awards was contrary to public policy.

Previously, this Court has stated that when the enforcement of an arbitration award violates an explicit public policy a court may not enforce it. *W.R. Grace and Co. v. Local Union 759, International Union of United Rubber Workers*, 461 U.S. 757, 766 (1983) citing *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948). Petitioner Michael Coffey submits that the confirmation of the arbitration awards was contrary to an explicit public policy and one that is well defined and dominant and which is ascertainable by reference to the law and legal precedents, and not from general considerations of supposed public interests. *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 43 (1987). Specifically, Coffey submits that, as this Court recognized in *W.R Grace and Co.*, 461 U.S. at 766, it "is beyond question that obedience to judicial orders is an important public policy".

In this case, there was a judicial order which divested the NFA of jurisdiction: the Final Judgment dismissed and barred all causes of action, specifically including arbitrations, for FCCB's

non-sales personnel (App., *infra*, 20a). Thus, as of July 15, 1988 (the date of the Final Judgment), the Winskes non-sales claims against Coffey were dismissed and barred. It was undisputed by the parties and acknowledged by the District Court that as of July 15, 1988, the Winskes had not made any sales claims against Coffey (App., *infra*, 11a). It was not until January 12, 1994 slightly over eight years after filing their original district court complaint that the Winskes attempted to assert a "sales claim" against Coffey, a time period clearly in excess of any statutes of limitation, statutes of repose and, most importantly, the arbitration body's (NFA's) filing deadlines (App., *infra*, 44a, 46a). In any event, at this point in time, January 12, 1994, the arbitration against Coffey was or should have been, by operation of law, already dismissed and barred and there was not, or at least should not have been, an arbitration proceeding within which the Winskes could have made new claims. Thus, asserts Petitioner Coffey, due in no small part to the Final Judgment, there was no jurisdiction for neither the arbitrators nor the District Court to issue nor confirm the awards. The Court of Appeals for the First Circuit previously acknowledged that an abuse of arbitral power or an exercise of power beyond the jurisdiction of the arbitrators would constitute the type of extraordinary situations in which judicial intervention would he appropriate. *Valentin v. U.S. Postal Service*, 787 F.2d 748, 750 (1st Cir. 1986). Similarly, it is or should be well settled that if federal courts are to have the jurisdiction in class suits to which they are obviously entitled, a decree when rendered must bind all of the class properly represented. *Res Judicata Effect of Judgment in Class Action Upon Subsequent Action in Federal Court* 48 A.L.R. Fed. 675, 681. Despite this, the District Court affirmed the arbitrators' actions and the Court of Appeals summarily acquiesced to the District Court. To quote Chief Justice Rehnquist in the dissent to *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 30 (dissenting opinion) "In its zeal to provide arbitration for a party it thinks deserving, the Court has made an exception to established rules of procedure."

In the instant case, the District Court and the Court of Appeals did not reject Coffey's argument that, as an employee of FCCB, he was entitled to the protections of the Final Judgment. There was no argument that the Winskes did not receive notice or that they otherwise challenged the Final Judgment and Order. Despite this, neither the District Court nor the Court of Appeals addressed the jurisdictional issues. Thus, the District Court and the Court of Appeals not only closed their doors to Petitioner Coffey on this issue but they confirmed the arbitration awards in violation of public policy.

Over the last four decades this Court has addressed several issues concerning the scope of arbitrability beginning with the so called Steelworkers trilogy: *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Co.*, 363 U.S. 593 (1960). More recently, this Court has looked to the nature of the agreement, if any, in determining the standard of review to be applied. In *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 648 (1986), this Court reaffirmed that the question of arbitrability is usually an issue to decided by the courts, unless the parties clearly and unmistakably provide otherwise. This holding was reinforced and expanded upon in *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1925-1926 (1995), where this Court held that (1) where parties have not clearly agreed to submit the question of arbitrability to the arbitrators the arbitrability of the dispute is subject to independent review by the courts and (2) Courts of Appeals, when reviewing district court decisions, should decide questions of law *de novo* and not apply the "abuse of discretion" standard.

In none of the recent cases before this Court however, has there been an assertion that a judicial order overrode any such

arbitration contract or agreement.[1] In the instant case the District Court and Court of Appeals applied a contractual analysis by citing *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987) and assuming that there was a "contract" by which the arbitrators could arbitrate their own arbitrability. (App., *infra*, 10a, 3a). However, there was no contract relied on or referenced by the District Court and Court of Appeals. Rather, the courts accepted the NFA's assertion that Coffey as an associate member of the NFA agreed to abide by the NFA's Code of Arbitration which provides for "mandatory arbitration" (App., *infra*, 3a, 9a, 35a-39a). Although, not articulated by either court, both courts apparently relied on the general principle that membership in a commercial body such as the NFA may bind individuals to arbitration provided for in the by-laws or rules of such organization. *Karasyk v. Marc Commodities Corp.*, 770 F. Supp. 824, 827-828 (S.D.N.Y. 1991). However, neither court specifically addressed the threshold jurisdictional issue raised by Coffey: Whether the arbitrators could still define their own jurisdiction in the face of a Final Judgment dismissing the then asserted claims against a party.

Petitioner Coffey submits that his case constitutes the next issue which should be addressed by this Court concerning the scope of arbitrability. Whether a party's previous "consent" to an ill-defined "mandatory arbitration" code section is sufficient to override a district court's later order specifically dismissing and

---

1. The case of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983), relied on by both the District Court and the Court of Appeals, concerned a district court's issuance of a stay order pending resolution of a state court suit. Similarly, in *Southland Corp. v. Keating*, 465 U.S. 1 (1983) there was a pending class action class but it had not reached any stage of finality. In contrast, Petitioner Coffey's case concerns a class action final judgment which dismissed and barred (or should have dismissed and barred) the arbitration before the arbitration had even commenced.

barring such arbitrations. Petitioner Coffey submits that the Court of Appeals erred when it held Coffey to this "mandatory arbitration". The Court of Appeals sanctioned the District Court's ruling that arbitrators could decide their own arbitrability despite a prior dismissal by the District Court. Indeed, neither court applied an independent standard of review thus completely by-passing this jurisdictional issue. (*See* Point II, *infra*). Thus, Petitioner Coffey submits that his case raises important jurisdictional issues viz-a-viz the power of private arbitration bodies versus the federal courts.

Accordingly, Petitioner Coffey submits that a writ of certiorari should issue so that this Court may properly enforce and/or if necessary address the limitations of arbitration bodies with regard to judicial orders.

II.

THE COURT OF APPEALS IS IN CONFLICT WITH THIS COURT'S DECISION IN *FIRST OPTIONS OF CHICAGO, INC. V. KAPLAN* ON THE MATTER OF THE STANDARD OF APPELLATE REVIEW IN REVIEWING THE CONFIRMATION OF ARBITRATION AWARDS.

A. Despite the existence of issues of law, the Court of Appeals applied an "abuse of discretion" standard in reviewing the District Court's confirmation of the arbitration awards.

In *First Options of Chicago, Inc. v. Kaplan,* 19 F.3d 1503 (3rd Cir. 1994), *rehearing denied*, 29 F.3d 111 (3rd Cir. 1994), *cert. granted*, 115 S. Ct. 634 (1994), *aff'd,* 115 S. Ct. 1920 (1995), this Court specifically rejected the argument that Courts of Appeals should apply a lenient "abuse of discretion" standard (as to questions of law) when reviewing district court decisions that confirm arbitration awards. This Court also concluded that

the fact courts grant arbitrators considerable leeway when reviewing most arbitration decisions "does not mean that appellate courts should give extra leeway to district courts that uphold arbitrators". *First Options of Chicago, Inc. v. Kaplan,* 115 S. Ct. at 1926. In *First Options of Chicago, Inc. v. Kaplan,* 115 S. Ct. at 1926, this Court also upheld the Third Circuit Court of Appeals in its ruling that it had authority to exercise plenary review over an arbitration panel's determination that it had jurisdiction (insofar as that determination turned on questions of law). *Kaplan v. First Options of Chicago, Inc.,* 19 F.3d 1503, 1509 (3d Cir. 1994). Thus, this Court concluded that courts of appeals should apply ordinary and not special standards when reviewing district court decisions upholding arbitration awards. *First Options of Chicago, Inc. v. Kaplan,* 115 S. Ct. at 1926.

In appealing to the Court of Appeals, Coffey raised what he asserts are jurisdictional issues (*i.e.*, the dismissal of the non-sales claims by the Final Judgment and Order and the time limitation which should have applied to the "sales" claims). However, the Court of Appeals affirmed the District Court's confirmation of the arbitration awards pursuant to First Circuit Local Rule 27.1 providing for summary disposition "if it shall clearly appear that no substantial question is presented" (App., *infra*, 3a, 29a). The Court of Appeals did not review nor even address the jurisdictional issues (not even to the point of at least addressing the assertion that there are jurisdictional issues in this case). Instead, the Court of Appeals gave "extra leeway" to the District Court by (1) summarily confirming the District Court's order "essentially for the reasons given by the district court" and (2) concluding that the arbitrators' finding that Coffey was a "salesperson" and that their determination that the sales claims were "not barred" were both "well within the arbitrators' discretion" (App., *infra*, 3a, 4a). Thus, by its own terms, the Court of Appeals applied an "abuse of discretion" standard.

It is interesting to note that the Court of Appeals, like the District Court, stated that the arbitrators made a "finding that Coffey was a 'salesperson' " (App., *infra*, 3a, 11a). However, the arbitrators made no such finding! The awards themselves contain no factual findings (App., *infra*, 30a-34a). Similarly, the Winske's Motion to Amend (to include "sales claims" against Coffey) was never ruled on and no explanation was ever given for the denial of Coffey's Motion to Dismiss (the only written ruling on a motion concerned discovery disputes) (App., *infra*, 41a, 42a). Similarly, the arbitrators made no ruling as to whether any claims were time barred (NFA staff having taken it upon themselves to determine that that issue "would not be decided by the arbitrators" (App., *infra*, 41a, 42a)). Petitioner Coffey is aware that a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. However, the conclusion that these "findings" were "well within the arbitrators' discretion" provides the basis for the Court of Appeals justification of its "abuse of discretion" standard. Thus, it is submitted that these errors, having no support in the record, are not merely factual but also go to the heart of the issues of jurisdiction and the standard of review.

Arguendo, even if the arbitrators had made specific findings that Coffey was a "salesperson" and that the Winske's new "sales claims" were not time barred, Petitioner Coffey submits that he would still have been entitled to at least an independent and *de novo* standard of review by the Court of Appeals. For example, in *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d at 1520, the Third Circuit concluded that Mr. Kaplan was entitled to an "independent judicial determination" of the issue of the arbitrators' jurisdiction based on the arbitrators' determination that Kaplan was the "alter ego" of a corporation (and thus subject to arbitration). Thus, Coffey submits that where factual issues are utilized solely to create jurisdiction, a court should apply an independent or *de novo* standard of review. This was not done by

either the District Court or the Court of Appeals. Similarly, as explained more fully in Part III, *infra*, other federal circuit courts of appeals have addressed arbitration time limitation issues and concluded that the issue of timeliness is for a court and not the arbitrators. *Paine Webber, Incorporated v. Hartmann*, 921 F.2d 507, 513 (3rd Cir. 1990), *Robbins v. Chipman Trucking, Inc.*, 866 F.2d 899, 901-902 (7th Cir. 1988).

In any event, under standards clarified under *First Options of Chicago, Inc. v. Kaplan, supra,* Coffey was entitled to, but did not get, an independent review of the arbitrators' jurisdiction. Accordingly, Petitioner Coffey submits that a writ of certiorari should issue so that this Court may reinforce, address and, if necessary, further clarify the definition of jurisdictional issues properly reviewable by courts in reviewing arbitration awards and the appropriate standard of review of arbitration bodies, district courts and circuit courts when confronted with jurisdictional questions.

III.

THE COURT OF APPEALS' INTERPRETATION OF THE JURISDICTION AND DISCRETION OF ARBITRATORS TO "ARBITRATE THEIR OWN ARBITRABILITY" CONFLICTS WITH OTHER COURTS OF APPEALS ON THIS SAME IMPORTANT MATTER.

A. The First Circuit Court of Appeals has held that a determination as to whether claims sought to be arbitrated are timely under the arbitration body's own code are within the arbitrator's discretion thus joining a conflict among the circuit courts.

In *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509 (7th Cir. 1992), the Seventh Circuit addressed the same issue Petitioner

Coffey submitted to the First Circuit: Whether arbitrators exceeded their jurisdictional authority by considering claims not brought until after the lapsing of a time period set forth in an arbitration body's code. In *Edward D. Jones, supra,* the Seventh Circuit made findings consistent with its earlier decisions in *Paine Webber Incorporated v. Farnam*, 870 F.2d 1286, 1292 (7th Cir. 1989) and *Robbins v. Chipman Trucking, Inc.*, 866 F.2d 899, 901-902 (7th Cir. 1988) that arbitration codes can limit the jurisdiction of arbitrators and that it is for the courts to define such jurisdiction. Interestingly, in *Edward D. Jones*, the Seventh Circuit, like the First Circuit in *Coffey v. Winske,* applied a contractual analysis. However, rather than assume the arbitrators had discretion and authority under a code of arbitration, the Seventh Circuit examined the arbitration body's rule barring time lapsed claims and concluded that it limited "the range of disputes the parties contractually agreed to arbitrate, thus limiting the jurisdiction of the arbitrators".[2] *Edward D. Jones,* 957 F.2d at 514. The *Edward D. Jones* court then looked to whether there was any "evidence in the record demonstrating that the parties intended to allow the arbitrators to define their own jurisdiction". *Edward D. Jones,* 957 F.2d at 514 citing *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986). Concluding that there was no such evidence, the *Edward D. Jones* court affirmed the district court's order vacating in part the arbitral award. *Edward D. Jones,* 957 F.2d at 514.

---

2. In *Edward D. Jones,* 957 F.2d at 511-512, the code section in question (Section 15 of the National Association of Securities Dealers ("NASD") Code) required that claims for arbitration be filed no more than six years after the underlying events.

Petitioner Coffey submits that his case is one of subject matter jurisdiction and highly analogous to *Edward D. Jones, supra*. The only evidence that the Court of Appeals relied on for their implicit finding that Coffey agreed to arbitration to the point of letting the arbitrators arbitrate their own jurisdiction was the NFA's assertion that that Coffey, as an associate member of the NFA, "agreed to abide by the NFA's Code of Arbitration" and said code states "that disputes involving commodity futures 'shall he arbitrated under this Code' " (App., *infra*, 35a). However, the mandatory arbitration provision of the NFA's rules (cited in the affidavit relied on by the Court of Appeals) begins by placing time limitations as prerequisites to this "mandatory arbitration":

> **Section 2. Arbitrable Disputes.**
>
> **(a) Mandatory Arbitration.**
> (1) Claims. *Except as provided in Sections 5 and 6 of this code with respect to timeliness requirements, the following disputes shall be arbitrated under this Code* if the dispute involves commodity futures contracts and does not require for its adjudication the presence of witnesses or other third parties over whom NFA lacks jurisdiction and who are not otherwise available.

NFA Code of Arbitration, Section 2(a)(1) (App., *infra*, 44a) (Emphasis added). Thus, before this "mandatory arbitration" can even be invoked, the NFA's timeliness requirements must he met. The above referenced Section 5 provides that:

> **Section 5. Time Period for Arbitration.**
>
> *No claim or counterclaim may he arbitrated under this Code unless a notice of intent to*

> *arbitrate or a statement of counterclaim is received by the Secretary within two years from the date when the party asserting the claim or counterclaim knew or should have known of the act or transaction that is the subject of the controversy.* The Secretary shall reject any claim or counterclaim that is not timely filed. If, in the course of arbitration, the Panel determines that the requirements of this section have not been met as to a particular claim or counterclaim, the Panel shall thereupon terminate the arbitration of the claim or counterclaim without decision or award.

NFA Code of Arbitration, Section 5 (App., *infra*, 46a). Thus, like Section 15 of the NASD Rules, Section 15 of the NFA Code provides a mandatory time requirement to he\ met before arbitration of a claim can he permitted. *See Merrill Lynch Pierce Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381 (11th Cir. 1995); *Dean Witter Reynolds, Inc. v. McCoy*, 995 F.2d 649 (6th Cir. 1993); *Paine Webber, Inc. v. Allen*, 888 F. Supp. 53 (E.D. Va. 1993), *aff'd*, 45 F.3d 427 (4th Cir. 1995); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509 (7th Cir. 1992). As an aside, it should he noted that, if arbitration agreements are essentially creatures of contract, than the NFA breached its contract with Petitioner Coffey by not following its own rules: the Secretary of the NFA did not reject the new time barred claims upon receipt and the arbitration panel did not determine whether the new claims were time barred (both required by Section 5, *supra*). Instead, NFA staff took it upon themselves to make this determination. Additionally, it must be mentioned that one federal district court has noted that the language of NFA Section 2(a) "is not a model of clarity". *Karasyk v. Marc Commodities Corp.*, 770 F. Supp. 824, 828 (S.D.N.Y. 1991). Applying this Court's recent

reiteration in *First Options of Chicago v. Kaplan,* 115 S. Ct. at 1924, that the presumption in favor of arbitrability is not applicable when the question to he resolved is who decides arbitrability, it is submitted that, even viewed as ambiguous, that the language of Section 2(a) was not sufficient to permit the type of assumption made by the First Circuit Court of Appeals (*i.e.,* that the arbitrators were applying a "contract"). *See Merrill Lynch Pierce Fenner & Smith, Inc. v. Cohen,* 62 F.3d 381, 383-385 (11th Cir. 1995).

In ruling that whether the Winske claims were time barred under the NFA Code was "well within the arbitrators' discretion", the First Circuit joined with those circuits which have ruled that "arbitrators may arbitrate their own arbitrability" even in ruling on claims filed after the expiration of their own filing deadlines. For example

1. In *Smith Barney Shearson, Inc. v. Boone,* 47 F.3d 750, 754 (5th Cir. 1995), the Fifth Circuit ruled that "time barrs" in an American Stock Exchange Rule were "procedural matters" to be decided by the arbitrators;

2. In *FSC Securities Corp., Inc. v. Freel,* 14 F.3d 1310, 1312-1313 (8th Cir. 1994), the Eighth Circuit concluded, in conflict with other circuits, that the NASD Code was sufficient evidence that the parties intended for the arbitrators to decide all issues of timeliness;

3. In *Shearson Lehman Hutton, Inc. v. Waggoner,* 944 F.2d 114, 121 (2d Cir. 1991), the Second Circuit stated that "*any* limitations defense — whether stemming from the arbitration agreement, arbitration association rule or state statute — is an issue to be addressed by the arbitrators" (emphasis in original).

4. In *O'Neel v. National Association of Securities Dealers,*

Inc., 667 F.2d 804, 807 (9th Cir. 1982) the Ninth Circuit adopted the rule that the validity of time barred defenses to enforcement of arbitration agreements should generally be determined by the arbitrator rather than the court.

However, the above circuits (and the First Circuit) are in conflict with the following circuits:

1. In *Merrill Lynch Pierce Fenner & Smith, Inc. v. Cohen,* 62 F.3d 381, 384 (11th Cir. 1995) the Eleventh Circuit concluded that the plain language of Section 15 of the NASD Code made its time limitation a "jurisdictional prerequisite to arbitration";

2. In *Roney and Co. v. Kassab*, 981 F.2d 894, 899 (6th Cir. 1992), the Sixth Circuit held that whether a party complied with a New York Stock Exchange ("NYSE") rule requiring an aggrieved party to commence arbitration proceedings within six years was a legal question upon which the court could rule;

3. In *Paine-Webber, Inc. v. Allen,* 888 F. Supp. 53, 54-55 (E.D. Va. 1993), *aff'd,* 45 F.3d 427 (4th Cir. 1995), the Fourth Circuit affirmed a district court which had found that the question of whether six years or more had elapsed so as to preclude arbitration under Section 15 of the NASD Code presented a substantive issue to be decided by the court.

4. *In Paine Webber, Inc. v. Hartmann*, 921 F.2d 507, 513-514 (3rd Cir. 1990), the Third Circuit held that a district court did not commit error in interpreting a NYSE rule making claims more than six years old ineligible for arbitration; and

5. In *Robbins v. Chipman Trucking, Inc.*, 866 F.2d 899, 901-902 (7th Cir. 1988), the Seventh Circuit ruled that the issue of timeliness of a request for arbitration under a statute was for the district court rather than the arbitrator.

Thus, Petitioner Coffey submits that there is a conflict between the circuit courts of appeals which this Court should address. Obviously Petitioner Coffey's case is important to him. However, the Petitioner also respectfully submits that his case now presents important legal issues, to wit, to what extent may arbitrators or arbitration bodies decide their own jurisdiction when dealing with possibly time barred claims and what standard should courts utilize in addressing or reviewing this type of jurisdictional issue. Finally, the Petitioner humbly submits that he is not exaggerating when he suggests that this is a national issue given its importance to the nation's stock and commodity exchanges and investment firms (as illustrated by the specific conflict in the circuits over NASD Section 15 noted in *Paine Webber v. Landay*, 903 F. Supp. 193, 199 (D. Mass. 1995)) as well as to the numerous other parties who utilize arbitration such as professional and self regulatory organizations, labor unions, and other individuals and entities affected by arbitration (as illustrated by the general conflict in the circuits. *Compare Shearson Lehman Hutton, Inc. v. Waggoner*, 944 F.2d 114, 121 (2d. Cir. 1991) with *Robbins v. Chipman Trucking, Inc.*, 866 F.2d 899, 901-902 (7th Cir. 1988)).

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN J. WASHBURN
Counsel of Record
Attorney for Petitioner
4 Dodge Road
P.O. Box 264
North Reading, Massachusetts 01864
(508) 664-5000

APPENDIX A — MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED APRIL 30, 1996

CLERK'S OFFICE
U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 95-2222
95-2223

(Date) April 30, 1996

Mandate herein issued today.

Michael Coffey v. Ernest Winske
Michael Coffey v. David Winske

Francis P. Scigliano, Clerk

APPENDIX B — PER CURIAM AFFIRMANCE OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED APRIL 8, 1996

[NOT FOR PUBLICATION]
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-2222

MICHAEL COFFEY,
Plaintiff-Appellant,
v.
ERNEST WINSKE,
Defendant-Appellee,

No. 95-2223

MICHAEL COFFEY,
Plaintiff-Appellant,
v.
DAVID WINSKE,
Defendant-Appellee,

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark L. Wolf, *U.S. District Judge*]

Before

Torruella, *Chief Judge*,
Stahl and Lynch, *Circuit Judges*.

Appendix B

John J Washburn on brief for appellant.
Dallas W. Haines III on brief for appellee.

April 8, 1996

Per Curiam. Having reviewed carefully the record in this case, we affirm the order confirming the arbitration award to appellees essentially for the reasons given by the district court in its memorandum and order dated September 15, 1995.[1]

Appellant Coffey's contention that the National Futures Association [NFA] was without jurisdiction to consider appellees' claims is without merit. Uncontradicted evidence was introduced through sworn afffidavits that Coffey, as an associate member of the NFA, agreed to abide by the NFA's Code of Arbitration. That code clearly states that disputes involving commodity futures "shall be arbitrated under this Code.

The arbitrators' finding that Coffey was a "salesperson," and hence still subject to claims by those, like appellees, who chose to opt out of an earlier class settlement, was well within the arbitrators' discretion, *see, e.g., El Dorado Technical Services v. Union General*, 961 F.2d 317, 320 (1st Cir. 1992) ("as a general proposition, an arbitrator's factual findings are not open to judicial challenge"), as was their determination that appellees' claims were not time barred under the NFA Code, *see United Paperworkers' Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) ("as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not

---

1. Appellees' motion to adopt previously filed memoranda as brief or appeal" is *granted.*

suffice to overturn his decision"); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability").

Affirmed. See 1st Cir., Loc. R. 27.1.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED SEPTEMBER 18, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 94-11635-MLW

MICHAEL COFFEY,

v.

ERNEST WINSKE,

JUDGMENT

WOLF, D.J.

In accordance with the Court's Memorandum and Order dated *September 15. 1995*, denying *plaintiff's* Motion to Vacate the arbitrator's award in the above-entitled action, it is hereby ORDERED:

Judgment for *defendant, ERNEST WINSKE, in the amount of $6,120.*

By the Court,

s/ Zita Lovett
Deputy Clerk

Date: *September 18, 1995*

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED SEPTEMBER 18, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 94-11636-MLW

MICHAEL COFFEY,

v.

DAVID WINSKE,

JUDGMENT

WOLF, D.J.

In accordance with the Court's Memorandum and Order dated *September 15, 1995*, denying *plaintiff's* Motion to Vacate the arbitrator's award in the above-entitled action, it is hereby ORDERED:

Judgment for *defendant, DAVID WINSKE, in the amount of $4,572.*

By the Court,

s/ Zita Lovett
Deputy Clerk

Date: *September 18, 1995*

APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED SEPTEMBER 15, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 94-11635-MLW

MICHAEL COFFEY,

Plaintiff,

v.

ERNEST WINSKE,

Defendant.

C.A. No. 94-11636-MLW

MICHAEL COFFEY,

Plaintiff,

v.

DAVID WINSKE,

Defendant.

MEMORANDUM AND ORDER

WOLF, D.J. September 15, 1995

Appendix E

These two cases arise out of arbitration proceedings conducted by the National Futures Association ("NFA") in which Ernest and David Winske were awarded $6,120 and $4,572 respectively against Michael Coffey. Coffey has petitioned to have the awards vacated pursuant to 9 U.S.C. § 10. Each of the Winskes has moved to have his award confirmed pursuant to 9 U.S.C. § 9. For the reasons stated below, Coffey's request that the awards be vacated is without merit. The awards are, therefore, being confirmed.

I. THE FACTS

Coffey was an employee of First Commodity Corporation of Boston ("FCCB"). The Winskes were customers of FCCB. In 1986, the Winskes filed a civil action in the United States District Court for the District of Massachusetts, which essentially alleged that they had been defrauded by FCCB and two of its employees. In February, 1987, the Winskes amended their complaint to add several additional defendants, including Coffey.

At that time, FCCB and its employees were the subject of many suits brought by customers in federal courts throughout the United States, which were referred to this court for consolidated pretrial proceedings by the Judicial Panel on Multidistrict Litigation. *See In re: First Commodity Corporation of Boston Customer Accounts Litigation*, MDL No. 713, Civ. No. 87-444-WF. A class action was certified for settlement purposes and a Final Judgment and Order of Dismissal was entered on July 15, 1988, as part of the settlement, the Final Judgment barred all claims by members of the plaintiff customer class against FCCB and its employees unless a customer opted- out of the settlement class; opt-outs were authorized to "pursue, in separate

proceedings and at their own cost, whatever rights they may have had for actual damages against [FCCB] and [FCCB's] salespeople." See Ex. E to Petitioner's Appendix concerning Ernest Winske, Final Judgment and Order of Dismissal, §§ 5-6. The Winskes opted-out of the class settlement.

In May 1993, each of the Winskes initiated arbitration proceedings against Coffey and William Blumenreich, another FCCB former employee, with the NFA, of which NFA members agree to abide by its Code of Arbitration, which provides for mandatory arbitration of disputes brought by customers against members concerning commodity futures contracts and options. *See* Affidavit of Cynthia A. Cain, attached to David Winske's Supplemental Objection to Michael Coffey's Motion to Vacate Arbitration Award.

In the arbitration proceedings, the Winskes alleged they suffered losses in excess of $50,000. The hearing was conducted over four days during a five month period. Coffey was represented by counsel and personally participated in some of the sessions. On May 5, 1994, the arbitrators issued their awards of $6,120 to Ernest Winske and $4,572 to David Winske. Copies were mailed to counsel on May 11, 1994. These actions to vacate were commenced by Coffey on August 12, 1994. The Winskes responded and filed their cross-motions to confirm on September 15, 1994.

II. DISCUSSION

The Winskes initially claim that Coffey's actions should be dismissed as untimely because notice of the motions to vacate were not served on them "within three months after the award[s] [were] filed or delivered" as required by 9 U.S.C. § 12. Coffey's

case, however, was filed within three months of the time his counsel would have received the NFA's decision and there is no prejudice to the Winskes as a result of what they allege is a failure to comply with the time limits established by 9 U.S.C. § 12. The Supreme Court has held that "rules of procedure should be liberally construed and . . . 'mere technicalities should not stand in the way of consideration of a case on its merits." *Torres v. Oakland Scavenger Company*, 487 U.S. 316 (1988) (quoting *Foman v. Davis*, 371 U.S. 178, 181 (1962)). Thus, even assuming, without deciding, that the petitions to vacate in these cases were served several days late, it would not be appropriate to dismiss them for that reason. Similarly, the Winskes responses should not be dismissed even if, as Coffey alleges, they were filed one day late.

This court's role in reviewing the arbitrator's decision is limited. "A federal court is empowered to vacate an arbitrator's award only on the grounds specified in 9 U.S.C. § 10." *Mobil Oil v. Local 8-766, Oil, Chemical and Atomic Workers International Union*, 600 F.2d 322, 326 (1st Cir. 1979). More generally, as the Supreme Court has stated: "The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misrepresentation of the contract." *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987). In *Misco*, the Court went on to say that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced that he committed serious error does not suffice to overturn his decision." *Id.*, at 38. The Court of Appeals for the First Circuit has reiterated that "judicial intrusion is restricted to extraordinary situations including abuse of arbitral power or exercise of power beyond the jurisdiction of the arbitrator."

Valentin v. U.S. Postal Service, 787 F.2d 748, 750 (1st Cir. 1986) (quoting *Mobil Oil*, 600 F.2d at 326.). Federal courts have afforded such deference to an arbitrator's decision in order to promote the "strong federal policy favoring arbitration as an alternative dispute resolution process." *Valentin*, 787 F.2d at 750.

Coffey first claims that the NFA was barred from considering the Winskes' cases because Coffey was not a "salesperson" as to whom the class settlement permitted opt-outs to pursue claims. Coffey notes that a case brought against him by another FCCB customer, Kenneth Poulin, was dismissed by a NFA arbitration panel, evidently on that basis. That result was not binding upon the Winskes, however, because they were not parties to the Poulin proceeding, or in privily with Poulin, although they had the same attorney. *See e.g., Montana v. United States*, 440 U.S. 147, 153-54 1979); *Gonzalez v. Banco Central Corp.*, 27 F.3d 751, 756-62 (1st Cir. 1994); *Kowalski v. Gagne*, 914 F. 2d 299, 302 (1st Cir. 1990); *South Boston Allied War Veterans Council v. City of Boston*, 875 F.Supp. 891, 908-09 (D.Mass. 1995).

With regard to the merits, although not part of the original allegations against Coffey, the Winskes moved to amend their claims against to assert that he personally participated in FCCB's efforts to sell them commodities options. It was well within the arbitrators broad discretion to believe the Winskes and find Coffey to be one of the "salespeople" subject to claims by opt-outs. As the Supreme Court explained in *Misco*:

> Because the parties have contracted to have disputes settled by an arbitrator . . . rather than by a judge, it is the arbitrator's view of

> the facts and the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.

Misco, 484 U.S. at 37-38 (1987); *see also, S.D. Warren Company v. United Paperworkers' International Union, AFL-CIO, Local 1069*, 845 F.2d 3, 7 (1st Cir. 1988) (same).

This analysis is also applicable to Coffey's contention that the Winskes claim that he was a "salesperson" was time-barred. The NFA code provides that a notice of intent to arbitrate is required "within two years from the date when the party asserting the claim knew or should have known of the act or transaction that is the subject of the controversy." Ex. T to Petitioner's Appendix concerning Ernest Winske, NFA Code § 5. Coffey does not dispute that the 1987 filing of the amended complaint in this court gave him adequate notice that the Winskes were seeking to recover from him and gave him the notice required by the NFA Code with regard to the facts then alleged. He contends, however, that because the Winskes did not allege prior to 1993 that he personally participated in sales to them, that particular claim was time barred. The NFA, however, found that Coffey had sufficient, timely notice of the Winskes' claims and, therefore, denied his motion to dismiss the contention that he was one of FCCB's "salespeople" as time-barred. This decision too was within the arbitrator's discretion. The scope of an arbitration agreement must be interpreted broadly and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to

arbitrability." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 and n.27 (1983). The arbitrators' decision was consistent with this principle.

Coffey next contends that the awards should be set aside because they were obtained by fraud because the Winskes, in October 1993, did not admit that thy had signed FCCB Risk Disclosure Statements. More specifically, in response to a request to admit they had signed Risk Disclosure Statements, Ernest Winske stated: "Denied, in so far as I do not have a copy of this signed document." Ex. N to Petitioner's Appendix concerning Ernest Winske, ¶ 3. David Winske replied: "Whether this document was among the ones I was told to sign I do not know, as I do not have a copy of what was signed. I believe so." Ex. N to Petitioner's Appendix concerning David Winske, ¶ 3. Coffey claims, however, that on or about January 12, 1987, the then defendants in the Winskes' civil action filed an opposition to their motion for an equitable attachment which was supported by the Risk Disclosure Statements signed by each of the Winskes.

The Winskes' counsel responds that although he apparently received these documents in 1987, he was not aware of this in 1993 when the Winskes were responding to Coffey's request for admissions. The Winskes also contend that Coffey had the Risk Disclosure Statements in any event. However, as Coffey did not become a party to the Winskes' civil action until February, 1987, this may not be true.

It is not necessary to resolve the questions whether the Winskes and/or Coffey had the Risk Disclosure Statements at the time of the arbitration proceedings. 9 U.S.C. § 10(a) does authorize vacating an arbitration award procured by fraud.

Appendix E

In reviewing cases under § 10(a), courts have relied upon a three part test to determine whether an arbitration award should be vacated for fraud. First, the movant must establish the fraud by clear and convincing evidence. *LaFarge Conseils et Etudes S.A. v. Kaiser Cement*, 791 F.2d 1334, 1339 (9th Cir. 1986); *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1297 (9th Cir.), *cert. denied*, 459 U.S. 990, 103 S.Ct. 346, 74 L.Ed.2d 386 (1982). Second, the fraud must not have been discoverable upon the exercise of due diligence prior to or during the arbitration. *Karppinen v. Karl Kiefer Machine Co.*, 187 F.2d 32, 35 (2d Cir. 1951) (A.Hand., J.); *see also Kaiser Cement*, 791 F.2d at 1339; *Dogherra*, 679 F.2d at 1297. Third, the person seeking to vacate the award must demonstrate that the fraud materially related to an issue in the arbitration. *Kaiser Cement*, 791 F.2d at 1339; *Dogherra*, 679 F.2d at 1297; *see also Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir.) (fraud must deprive partly of fair hearing), *cert. denied*, 393 U.S. 954, 89 S.Ct. 378, 21 L.Ed.2d 365 (1968); *cf. Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978) relief from judgment under Fed. R. Civ. P. 60(b)(3) requires showing that perjury prevented losing party from "fully and fairly presenting this case or defense"); *Harre v. A.H. Robbins*, 750 F.2d 1501, 1503 (11th Cir. 1985) (same). The last

> element does not require the movant establish that the result of the proceedings would have been different had the fraud not occurred. *Cf. Wilson v. Thompson*, 638 F.2d 801, 804 (5th Cir. Unit B March 1981) (60(b)(3)).

Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988). In this case, Coffey has not proven that the Winskes intentionally withheld the Risk Disclosure Statements from the arbitrators. David Winske did not deny that he signed one. More significantly, there is no evidence that these documents were not discoverable by Coffey if he had exercised due diligence during the many months that the arbitration proceedings were in progress. Coffey has been able to find the Risk Disclosure Statements and submit them to this court. If they were, indeed, genuinely perceived to be material to the arbitration proceeding there is no evident reason why Coffey — if he did not have them — could not have obtained them earlier and presented them to the arbitrators.

Finally, Coffey contends the arbitration awards should be vacated because the arbitrators made remarks reflecting a bias against him. These remarks consisted of: first, an alleged warning to Coffey's counsel on March 15, 1994, to "beware the Ides of March;" second, an alleged reference to Coffey, who had not appeared on the previous two hearing dates, as the "invisible man;" and, third, an arbitrator reportedly laughing at Coffey's counsel's closing argument.

There is no contention that Coffey's counsel objected to the now alleged bias of the arbitrators at the hearings or sought their disqualification. Thus, this claim may have been waived. *See e.g.*

Appendix E

Bernstein Seawell & Kove v. Bosarge, 813 F.2d 726, 732 (5th Cir. 1987).

More significantly, there is inadequate evidence of bias to justify vacating the awards. Coffey does not contend that the arbitrators had any conflict of interest or preexisting relationship with the Winskes. Arbitrations may be informal proceedings and the remarks attributed by Coffey to the arbitrators while perhaps not judicious do not prove a bias against him. Courts have declined to vacate awards based on alleged partiality when much more serious circumstances have been demonstrated. *See e.g., Trustees of Pressman Local 72 Industry Pension Fund v. Judd & Detweiler, Inc.*, 736 F.Supp. 1351 (D.Md. 1988) (arbitrator not disqualified from hearing case despite fact that he testified six times as expert witness on related issues); *Peabody v. Rotle Mosan, Inc.*, 677 F.Supp. 1135 (M.D.Fla. 1987) (award not vacated despite arbitrator's remote relationship to expert witness). In the instant case, there is a similarly insufficient basis to vacate the awards because of the alleged partiality of the arbitrators.

Accordingly, each of Coffey's claims is without merit. It is, therefore, appropriate to confirm, rather than vacate, the awards.

III. Order

In view of the foregoing, it is hereby ORDERED that:

1. Michael Coffey's petitions to vacate the arbitrators' awards to Ernest Winske and David Winske are each DENIED.

2. Ernest and David Winskes motions to confirm their respective awards are each ALLOWED.

Appendix E

3. Judgment for Ernest Winske shall enter, in the amount of $6,120, in C.A. No. 94-11635-MLW.

4. Judgment for David Winske shall enter, in the amount of $4,572, in C.A. No. 94-11636-MLW.

s/ Mark L. Wolf
United States District Court

APPENDIX F — FINAL JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED JULY 15, 1988

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MDL No. 713
(ALL CASES)

IN RE: FIRST COMMODITY CORPORATION OF BOSTON CUSTOMER ACCOUNTS LITIGATION

Civ No.
87-444-WF

ELIZABETH JULKOWSKI, et al., Individually and on behalf of all other persons similarly situated,

Plaintiffs.

v.

FIRST COMMODITY CORPORATION OF BOSTON, et al.,

Defendants.

WOLF, D.J. July 15, 1988

FINAL JUDGMENT AND ORDER OF DISMISSAL

This matter having come before the Court on motion for approval of a settlement in these actions, and the Court, having

considered all papers filed in connection with said motion, and after a hearing on July 7, 1988, for the reasons explained in court on July 15, 1988, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

1. This Court has jurisdiction over the subject matter of this action and over all parties to this action, including all members of the Class as that term is defined in this Court's Order No. 6 certifying the Class filed on October 9, 1987.

2. This Court hereby confirms its order dated October 9, 1987, certifying this litigation as a class action and certifying two settlement classes pursuant to Rules 23(b)(1) and 23(h)(3), respectively of the Federal Rules of Civil Procedure.

3. This Court hereby approves the settlement set forth in the Amended Stipulation of Settlement (the "Stipulation"), dated September 28, 1987, and finds that said settlement of plaintiffs' claims in the First Consolidated Class Action Complaint ("Consolidated Complaint") is, in all respects, fair, reasonable, and adequate to the Class. The various terms and phrases used in this judgment and order shall have the same definition and meaning as in said Stipulation.

4. Except as set forth in paragraph 6 below, this Court dismisses, discharges and orders released any and all claims, actions, requests for relief or causes of action alleged by plaintiffs and members of the Class in the complaints filed in the above-captioned consolidated actions and the Consolidated Complaint filed herein, or which could have been alleged therein, arising out of the subject matter of the complaints or the Consolidated Complaint, as to First Commodity Corporation of

Boston ("First Commodity") (and its present and former directors, officers, employees and agents [except only for David Aucella and David Connolly]), Don R. Schleicher, Richard A. Schleicher, Stephen E. Meresman, Hendrik Maas, and James M. Bruchs (collectively referred to as the "Settling Defendants"), on the merits with prejudice and without costs or attorneys' fees, except as provided in the Stipulation.

5. Except as set forth in paragraph 6 below, all plaintiffs and members of the Class, whether or not they have filed lawsuits, arbitrations or similar proceedings, and their heirs, executors, administrators, successors, assigns (collectively referred to as the "Claimants") are hereby forever barred and enjoined from instituting or prosecuting, either directly or indirectly against each of the Settling Defendants, their predecessors, successors-in-interest, heirs or assigns, any entity now, or in the past or hereafter controlled by them or controlling them, and the past and present partners, officers, directors, principals, parents, subsidiaries, affiliates, divisions, predecessor or successor partnerships or corporations, employees, agents, and attorneys of each of them, or of any entity controlled by them or controlling them (collectively referred to as "Releases"), any manner of actions, and causes of action, suits, arbitrations, reparations, obligations, debts, demands, agreements, promises, liabilities, controversies, costs, expenses, and attorneys' fees whatsoever, including but not limited to, any actions for disgorgement, whether based on any federal or state law or right of action, foreseen or unforeseen, matured or unmatured, known or unknown, accrued or not accrued, which Claimants had, have, or may hereafter have against Releases, or any of them, for, by reason of, or arising from or in any way based on, connected with or related to the facts, circumstances, transactions, or occurrences alleged or which could have been alleged directly or

indirectly in the complaints in the above captioned consolidated actions, or the Consolidated Complaint herein including the purchase or sale of commodities through First Commodity during the period from December 1, 1979 through April 20, 1987, inclusive.

6. Those persons who have timely requested exclusion from the class certified pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure (the "Rule 23(b)(3) class") are bound by the provisions of paragraphs 4 and 5 above, except such persons have not released and are free to pursue, in separate proceedings and at their own cost, whatever rights they may have for actual damages against First Commodity and First Commodity's salespeople.

7. Those persons who seek to share in the benefits provided to the Rule 23(b)(1) or Rule 23(b)(3) class must file a Proof of Claim not later than October 28, 1988, as provided in Section VII of the Notice of Class Action dated March 24, 1988.

8. The stipulation and settlement embodied therein are not an admission of the validity of any actions or claims which arise out of, directly or indirectly, or are in any way connected with the facts, circumstances, transactions, or occurrences described directly or indirectly in these actions, or of any wrongdoing, or of any violation of any law; and Stipulation and settlement are not a concession and neither shall be used as an admission of any fault or omission in any statement, release, or written document issued, filed, or made; and neither the Stipulation nor the settlement embodied therein or any related document shall be offered or received in evidence in any civil, criminal, or administrative action or proceeding other than such proceedings as may be necessary to consummate or enforce the Stipulation and the Settlement embodied therein.

9. David Aucella and David Connolly are not parties to the Stipulation and Claimants need not opt out to pursue claims for all damages allowed by law against those defendants. This judgment and the release contained herein do not relate to David Aucella and David Connolly.

10. Upon consideration of the fee petitions, Class counsel are awarded an aggregate amount of *$1,315,453.00* as attorneys fees and expenses, to be paid to Class counsel from the Gross Settlement Fund by the Escrow Agent as provided in paragraphs 12 and 13 of the Stipulation at the time of Final Approval as defined in paragraph 7 of the Stipulation.

11. Upon Final Approval as defined in paragraph 7 of the Stipulation, the Escrow Agents shall pay over to the National Futures Association ("NFA") as settlement Administrator the Net Settlement Fund (including interest) as provided in paragraphs 12 and 23 of the Stipulation, and the NFA shall process and pay claims of Class members as provided in paragraphs 14, 15 and 23 of the Stipulation and sections VII and VIII of the Notice of Class Action dated March 24, 1988.

12. It is expressly determined, within the meaning of Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delaying entry of final judgment, and the entry of this final judgment is hereby expressly directed.

13. Without affecting the finality of this judgment, the Court hereby reserves and retains continuing jurisdiction to order the performance of the Stipulation and the settlement embodied therein, including but not limited to, the approval or rejection of any claims tiled by Class members, the distribution of the proceeds of the settlement in accordance with the

Appendix F

Stipulation, the consideration of any fee petitions from Class counsel regarding fees and expenses incurred hereafter for administration of the settlement or other matters, the decision of any motions by Class members for relief from any provisions of this judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, and the decision of any request to allow the untimely exclusion of a person from the Rule 23(b)(3) class for good cause shown.

July 15, 1988

s/ Mark L. Wolf
UNITED STATES DISTRICT JUDGE

APPENDIX G — STATUTES AND RULES INVOLVED

THE FEDERAL ARBITRATION ACT

Title 9, United States Code, § 9

Title 9 U.S.C. §9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States District court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as prescribed by law.

Title 9, United States Code, § 10

Title 9 U.S.C. § 10 Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

Appendix G

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.

(5) Where an award is vacated and the time within the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.
(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

Appendix G

FEDERAL RULE OF CIVIL PROCEDURE 23

Rule 23

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous so that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby

making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or tact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Actions to be Maintained; Notice; Judgment Actions Conducted Partially as Class Actions. (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by

a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence of argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such matter as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims and defenses, or otherwise to come into the action; (3) imposing

conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

FIRST CIRCUIT COURT OF APPEALS
LOCAL RULE 27.1

LOC. R. 27.1 SUMMARY DISPOSITION

At any time, on such notice as the court may order, on motion of appellee or sue sponte, the court may dismiss the appeal or other request for relief or affirm and enforce the judgment or order below if the court lacks jurisdiction, or if it shall clearly appear that no substantial question is presented. In case of obvious error the court may, similarly, reverse. Motions for such relief should be promptly filed when the occasion appears, and must be accompanied by four copies of a memorandum or brief.

APPENDIX H — ARBITRATION AWARD IN *ERNEST WINSKE v. MICHAEL COFFEY AND WILLIAM BLUMENREICH*, NFA NO. 93-ARB-99

NFA NATIONAL FUTURES ASSOCIATION

In the Matter of the Arbitration Between

Ernest Winske

Claimant,

v.

Michael Coffey
William Blumenreich and

Respondents.

Re: 93-ARB-99

AWARD

The following issues were presented to and decided by the undersigned Arbitrators: fraud, misrepresentation, fraud in the inducement, failure to supervise, jurisdiction, waiver, ratification, laches, statute of limitations, estoppel, mitigation and negligence or breach of duty of others.

We, being selected to hear and determine this matter in accordance with the Code of Arbitration of the National Futures Association, hereby determine that the following relief shall be granted.

Appendix H

Michael Coffee shall pay to *Ernest Winske*

Compensatory Damages	*$6,020*	(including interest)
Punitive Damages		
Treble Damages		
Interest		
Attorneys' Fees		
Other Costs	*100*	(1/2 Filing Fee)
Total Amount of Award	*$6,120*	

The Claim Against defendant William Blumenreich is denied.

s/ Cornelius McAuliffe — Dated: 5/2/94
Chairman

s/ Frank R. Casey — Date of Service: May 11, 1994

s/ Howard M. Schott

APPENDIX I — ARBITRATION AWARD IN *DAVID WINSKE V. MICHAEL COFFEY AND WILLIAM BLUMENREICH*, NFA NO. 93-ARB-84

NFA NATIONAL FUTURES ASSOCIATION

In the Matter of the Arbitration Between

David Winske

Claimant,

v.

Michael Coffey
William Blumenreich and

Respondents.

Re: 93-ARB-99

AWARD

The following issues were presented to and decided by the undersigned Arbitrators: fraud, misrepresentation, fraud in the inducement, failure to supervise, jurisdiction, waiver, ratification, laches, statute of limitations, estoppel, mitigation and negligence or breach of duty of others.

We, being selected to hear and determine this matter in accordance with the Code of Arbitration of the National Futures Association, hereby determine that the following relief shall be granted.

Appendix I

Michael Coffee shall pay to *David Winske*

Compensatory Damages	*$4,472*	(including interest)
Punitive Damages		
Treble Damages		
Interest		
Attorneys' Fees		
Other Costs	*100*	(1/2 Filing Fee)
Total Amount of Award	*$4,572*	

The Claim Against defendant William Blumenreich is denied.

s/ Cornelius McAuliffe — Dated: 5/2/94
Chairman

s/ Frank R. Casey — Date of Service: May 11, 1994

s/ Howard M. Schott

APPENDIX J — DECISION OF ARBITRATORS IN *KENNETH POULIN v. KEVIN BARRY, MICHAEL COFFEY AND SCOTT STANWOOD*, NFA NO. 92-ARB-189

NFA

IN ARBITRATION
BEFORE
NATIONAL FUTURES ASSOCIATION

92-ARB-189

Kenneth Poulin,

Claimant,

v.

Kevin Barry, Michael Coffey and Scott Stanwood,

DECISION

We, the arbitrators appointed to decide the above referenced matter have reviewed and considered the Motion to Dismiss filed by the Respondent, Michael Coffey, and the response to the Motion filed by the Claimant, Kenneth Poulin, and hereby determine the following:

> We have determined that we do not have jurisdiction to hear the claims against Michael Cofffey and, therefore, we the arbitrators, grant his Motion to Dismiss.

By: s/ William Contento
Chairman

Dated: *August 16, 1993*

s/ Jeffrey Frankel

s/ Henry Hardy

APPENDIX K — AFFIDAVIT OF CYNTHIA A. CAIN

NFA

AFFIDAVIT OF CYNTHIA A. CAIN

THE AFFIANT, CYNTHIA A. CAIN, BEING DULY SWORN UNDER OATH STATES THAT:

1. I am employed by National Futures Association ("NFA") as the Director of Arbitration. I have held this or a similar position since October 22, 1986. As the Director of Arbitration, I am responsible for, among other things, maintaining the records and files for the arbitration proceedings conducted by the NFA.

2. NFA arbitration proceedings are conducted in conformance with the provisions of NFA's Code of Arbitration ("Code").

3. Members and associates of NFA, in becoming Members and Associates, agree to abide by the Code.

4. Section 2(a) of the Code provides for mandatory arbitration of dispute concerning commodity futures contracts and options on futures contracts sought by customers against a Member or employee thereof, or Associate.

5. Section 1 (a) of the Code defines "Associate" as a person who is registered with NFA as an Associate or was so registered when the acts or transactions that are the subject of the dispute occurred.

6. David Winske filed an arbitration case captioned *David Winske v. Michael Coffey and William Blumenreich*, Case No. 93-ARB-84.

Appendix K

7. David Winske's Demand for Arbitration states in response to Question 4 on page 2 that the acts and transactions that are the subject of David Winske's dispute occurred in 1985-1986. (See Exhibit 1).

8. Ernest Winske filed an arbitration case captioned Ernest *Winske v. Michael Coffey and William Blumenreich*, Case No. 93-ARB-99.

9. Ernest Winske's Demand for Arbitration states in response to Question 4 on page 2 that the acts and transactions that are the subject of David Winske's dispute occurred in 1985-1986. (See Exhibit 2).

10. At the time the acts and transactions identified by Ernest and David Winske occurred, Michael Coffey was an Associate Member of the NFA. (See Exhibit 3).

Dated: October 13, 1994

s/ Cynthia A. Cain
Cynthia A. Cain
Director of Arbitration

Subscribed and sworn to before me
this *13th* day of *October*, 1994.

s/ Lori Solberg
Notary Public

"OFFICIAL SEAL"
LORI R. SOLBERG
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 7-13-98

My Commission Expires: *7/13/98*

APPENDIX L — CERTIFICATION OF GREGORY PRUSIK (EXHIBIT 3 IN CAIN AFFIDAVIT)

NFA EXHIBIT 3

CERTIFICATION

1. I, Gregory C. Prusik, am presently employed by National Futures Association ("NFA") as Vice President of NFA's Registration and Membership Department and also serve as Record Custodian. I have held the position of Record Custodian since June 29, 1990, and I am responsible for the receipt, processing, storage and recording of all applications for registration with NFA under the Commodity Exchange Act, as described below.

2. NFA is a futures association registered with the Commodity Futures Trading Commission under Section 17 of the Commodity Exchange Act.

3. NFA maintains these membership records in the normal, ordinary and regular course of business.

4. In my capacity of Record Custodian, I am familiar with the membership records of NFA, which are maintained under my supervision.

5. Under my supervision, I have caused to be conducted a review of these NFA membership records from October, 1978 through the present, which disclosed the following information:

> Michael Arthur Coffey ("Coffey") was granted approval as an NFA Associate Member with First Commodity Corp. of

Appendix L

Boston ("FCCB") effective August 1, 1985. Coffey remained approved as an NFA Associate Member with FCCB from that date until February 3, 1987, when his NFA associate membership with FCCB was withdrawn.

Coffey was granted approval as an NFA Associate Member with Option America ("OAI") effective February 4, 1987. Coffey remained approved as an NFA Associate Member with OAI from that date until February 29, 1988, when his NFA associate membership with OAI was withdrawn.

Coffey was granted approval as an NFA Associate Member with FGL Commodity Services, Inc. ("FGLCSHI") effective May 17, 1988. Coffey remained approved as an NFA Associate Member with FGLCSHI from that date until March 7, 1989, when his NFA associate membership with FGLCSHI was withdrawn.

Coffey was granted approval as an NFA Associate Member with FGL Commodity Services, Inc. of New England, Inc. ("FCSNEI") effective March 7, 1989. Coffey remained approved as an NFA Associate Member with FCSNEI from that date until May 1, 1989, when his NFA associate membership with FGLCSHI was withdrawn.

Appendix L

There is no record of an NFA associate member for Coffey after that date.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Date: October 7, 1994

s/ Gregory C. Prusik
Record Custodian

National Futures Association
200 West Madison Street
Chicago, Illinois 60606-3447

GCP/jll/foia/cof.107

APPENDIX M — AFFIDAVIT OF LORI SOLBERG

NFA

AFFIDAVIT OF LORI SOLBERG

THE AFFIANT, LORI SOLBERG, BEING DULY SWORN UNDER OATH STATES THAT:

1. I am employed by National Futures Association ("NFA") as a Case Manager. I have held this or a similar position since January 12, 1987. As a Case Manager, I am primarily responsible for administering and maintaining the NFA arbitration cases which are assigned to me.

2. My duties as a Case Manager include, among other things, coordinating and conducting all necessary communications (both oral and written) with the parties, their representatives and the arbitrators; advising the parties and arbitrators as needed; addressing legal and procedural issues, and obtaining legal review whenever necessary; recording case data on NFA's computerized tracking system; facilitating preparation of hearing plans; and representing NFA at hearings.

3. The arbitration cases captioned *David Winske v. Michael Coffey and William Blumenreich*, Case No. 93-ARB-84, and *Ernest Winske v. Michael Coffey and William Blumenreich*, Case No. 93-ARB-99, were assigned to and managed by me.

4. Section 5(m) of the NFA's Code of Arbitration provides that NFA may consolidate arbitration proceedings in the interest of providing a fair, equitable, and expeditious procedure when Demands for Arbitration involve common questions of fact or arise from the same act or transaction. In accordance with Section 5(m), the arbitration cases referred to in paragraph 3 above were consolidated for hearing by the NFA.

Appendix M

5. NFA held hearing sessions for those cases on January 25, March 14, March 15 and May 2, 1994. As the Case Manager, I attended all of the sessions, except for the May 2 session which was held while I was on vacation. A tape-recording of each hearing session was made by the NFA staff person who attended the hearing. John Washburn requested and was provided with copies of the tape-recordings of the hearing sessions.

6. The only written decision issued by the arbitrators relating to the motions filed in theses cases was issued on January 7, 1994 in response to the November 5, 1993 Motion to Compel Compliance with Discovery and the November 19, 1993 Supplemental Motion to Compel Production of Documents filed by Michael Coffey, and the December 17, 1993 Motion to Compel Complainants to Discovery fled by William Blumenreich.

7. Three other motions were filed by the parties in these cases. The decisions on those motions were confirmed by the arbitrators on the record at the various hearing sessions.

8. Once a claimant has filed a Demand at NFA, certain changes can be made to the claim by filing an amended Demand. The determination of what constitutes an amended Demand is made by NFA staff.

9. On January 18, 1994, David and Ernest Winske filed Motions to Amend their Claims. In reviewing the Motions, NFA staff determined that rather adding a new cause of action, the submissions provided new information on a claim contained in the original pleadings. As a result, NFA staff contacted the parties by telephone on January 21, 1994 to inform them that the filing was not considered to be an amendment to the Demands for Arbitration and, therefore, would not be decided by the

arbitrators. This decision was confirmed by the arbitrators on the record at the hearing on January 25, 1994.

10. As part of its pre-hearing procedures, NFA' arbitration rules require the parties (and/or their counsel) to prepare a written hearing plan. the purpose of the hearing plan is to provide, in effect, a road map for the expeditious conduct of the hearing. A hearing plan normally includes a brief summary of the case from each party's point of view, a statement of the claims and defenses involved, a statement of the agreed facts and disputed issues, and a list of the witnesses and exhibits that will be offered at the hearing as evidence.

11. In the *Winske* cases, the parties' counsel jointly prepared a written hearing plan. However, at the January 25 hearing session, Dallas Haines, counsel for David and Ernest Winske, John Washburn, counsel for Michael Coffey, and Jeffrey Boxer, counsel for William Blumenreich did not sign the plan.

Dated: August 11. 1994

s/ Lori Solberg
Lori Solberg
Case Manager

Subscribed and sworn to before
me this *11th* day of *August*, 1994.

s/ Mary A. Patton
Notary Public

"OFFICIAL SEAL"
MARY A. PATTON
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 6-5-97

APPENDIX N — NFA CODE SECTION 1(a)

EXCERPTS FROM THE NFA CODE OF ARBITRATION

NFA Code Section 1(a)

Section 1. Definitions. As used in this Code —

(a) "Associate" — means a person who is registered with NFA as an Associate or was so registered when the acts or transactions that are the subject of dispute occurred. (Under NFA Bylaws every person who is associated with a Member within the meaning of the term "associated person" as used in Section 4k of the Commodity Exchange Act, and who is required to be registered as such with the Commission, must register with the NFA as an Associate.)

. . .

APPENDIX O — NFA CODE SECTION 2(a)

EXCERPTS FROM THE NFA CODE OF ARBITRATION

NFA Code Section 2(a)

Section 2. Arbitrable Disputes.

(a) Mandatory Arbitration.

(1) Claims. Except as provided in Sections 5 and 6 of this code with respect to timeliness requirements, the following disputes shall be arbitrated under this Code if the dispute involves commodity futures contracts and does not require for its adjudication the presence of witnesses or other third parties over whom NFA lacks jurisdiction and who are not otherwise available:

(i) a dispute for which arbitration is sought by a customer against a Member or employee thereof, or Associate, provided that —

(A) the customer is not a futures commission merchant, floor broker, Member or Associate;

(B) the dispute does not solely involve cash market transactions that are not part of or directly connected with a commodity futures transaction; and

(C) if brought against a Member or employee thereof, the Member is a futures commission merchant, an introducing broker, a commodity pool operator, a commodity trading advisor, or a leverage transaction

Appendix O

(ii) a customer claim that is required to be arbitrated by NFA under a lawful agreement that complies with Commission Rule 180.3.

(iii) a customer claim whose resolution has been delegated to NFA by a contract market under Section 5a(11) of the Commodity Exchange Act.

(2) Counterclaims. Except as provided in Sections 5 and 6 of this code with respect to timeliness requirements, a counterclaim may be asserted against a customer in an arbitration brought under paragraph (1) above if the counterclaim:

(i) arises out of an act or transaction that is the subject of the customer's claim;

(ii) does not require for its adjudication the presence of witnesses or other third parties over whom NFA lacks jurisdiction and who are not otherwise available. A counterclaim that does not meet condition (i) above may be asserted against a customer only if the customer thereafter consents.

A counterclaim that does not meet condition (i) above may be asserted against a customer only if the customer thereafter consents.

. . .

APPENDIX P — NFA CODE SECTION 5

EXCERPTS FROM THE NFA CODE OF ARBITRATION

NFA Code Section 5

Section 5. Time Period for Arbitration.

No claim or counterclaim may be arbitrated under this Code unless a notice of intent to arbitrate or a statement of counterclaim is received by the Secretary within two years from the date when the party asserting the claim or counterclaim knew or should have known of the act or transaction that is the subject of the controversy. The Secretary shall reject any claim or counterclaim that is not timely filed. If, in the course of arbitration, the Panel determines that the requirements of this section have not been met as to a particular claim or counterclaim, the Panel shall thereupon terminate the arbitration of the claim or counterclaim without decision or award.

APPENDIX Q — NFA CODE SECTION 6

EXCERPTS FROM THE NFA CODE OF ARBITRATION

NFA Code Section 6

Section 6. Initiation of Arbitration.

An arbitration proceeding under this Code shall be initiated as follows:

(a) **Notice of Intent to Arbitrate.**

A person desiring arbitration under this Code shall notify the Secretary, either in writing or orally, of such person's intent to arbitrate. The Secretary shall maintain a record of the receipt of each such notice.

(b) Documents Furnished.

The Secretary shall promptly provide such person with a copy of this Code and a Demand for Arbitration.

(c) Demand for Arbitration.

If such person wishes to proceed with the arbitration, such person, within 35 days after the date of transmittal by the Secretary under (b) above, shall serve the completed Demand for Arbitration on the Secretary together with the appropriate fee (see Section 11 below) and, in an arbitration under Section 2(a)(1)(ii) or 2(b) above, a copy of the agreement to arbitrate. The Secretary shall promptly review each Demand for Arbitration for completeness. Any Demand for Arbitration which the Secretary deems to be incomplete, or which is not

accompanied by the appropriate fee, shall be returned by certified mail. In that event, such person shall serve a completed Demand for Arbitration, together with any unpaid fee, within 20 days following transmittal by the Secretary. The Secretary shall reject any Demand for Arbitration which has not been timely filed, or for which the appropriate fee has not been paid.

(d) Notice to Respondent.

The Secretary shall promptly serve a copy of the completed Demand for Arbitration on each person named therein as a Respondent, and a copy of any agreement to arbitrate.

(e) Answer.

The Respondent shall serve an answer on the Secretary within 45 days from the date of service of the Demand for Arbitration on the Respondent by the Secretary. The Respondent shall concurrently serve a copy of the Answer on the Claimant. An allegation in the Demand for Arbitration that is not denied in the Answer shall be deemed by the Panel to be admitted.

(f) Section 2(a)(2) Counterclaim.

Any counterclaim under Section 2(a)(2) must be asserted in the Answer, unless the Claimant consents to a later assertion of the counterclaim. If any counterclaim is asserted, the party asserting the counterclaim shall promptly remit the appropriate fee to the Secretary (see Section 11 below). Any counterclaim which the Secretary deems to be incomplete, or which is not accompanied by the appropriate fee, shall be returned by certified mail. In that event, such person shall serve a completed counterclaim, together with any unpaid fee, within 20 days

following service by the Secretary. The Secretary shall reject any counterclaim which has not been paid.

(g) Reply to Counterclaim.

The person against whom the counterclaim is asserted shall reply to the counterclaim by serving a Reply on the Secretary within 35 days after the date of service of the Answer or counterclaim by the Secretary, and concurrently shall serve a copy of the reply on the counterclaiming Respondent. Any allegation in the counterclaim that is not denied in the reply shall be deemed by the Panel to be admitted.,

(h) Amendments to Claim or counterclaim.

After the appointment of a Panel, no new or different claim or counterclaim may be filed except with the Panel's consent.

(i) Late Answer or Reply.

The Secretary shall accept any Answer or reply filed prior to the hearing. However, the Secretary or any party may present an objection to the Panel with regard to the timeliness of any filing.

(j) Consolidation.

When Demands for Arbitration involving common questions of fact or arising from the same act or transaction are received by the Secretary, the Secretary may, whether or not at the request of any party, order any or all of the proceedings to be consolidated for hearing in the interest of providing a fair, equitable, and expeditious procedure and may take such action concerning the proceedings herein as may tend to avoid unnecessary or unreasonable delay.